Supreme Court, U. S.
FILED
APR 3 1980
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1051

CITY OF ROHNERT PARK, a municipal corporation,
Petitioner,

vs.

MOON LANDRIEU, as Secretary of the United States Department of Housing and Urban Development, CITY OF SANTA ROSA, a municipal corporation, URBAN RENEWAL AGENCY of the City of Santa Rosa, a public body, corporate and politic, and ERNEST W. HAHN, INC., a California corporation,
Respondents.

Petitioner's Reply to Brief for the Federal Respondent in Opposition

WILLIAM M. BRINTON
RICARDO J. HECHT
1400 Alcoa Building
One Maritime Plaza
San Francisco, California 94111
Attorneys for Petitioner.

COTTON, SELIGMAN & RAY
Of Counsel

SORG PRINTING COMPANY OF CALIFORNIA, 345 FIRST STREET, SAN FRANCISCO 94105

SUBJECT INDEX

	Page
Reply	1
Whether the Housing Act Creates a Private Right of Action Is Irrelevant	2
Violation of Its Own Regulations by HUD	2
Petitioner Has Standing Under the Administrative Procedure Act	6
The Court of Appeals Cannot Dismiss for Lack of Standing Within the Context of this Case	9
Petitioner Has Standing to Seek Injunctive Relief Under Section 16, Clayton Act	9
Conclusion	12

TABLE OF AUTHORITIES CITED

Cases	Pages
Armond Schmoll Inc. v. Federal Reserve Bank (1941) 37 N.E.2d 225, 286 N.Y. 503, cert. den. 315 U.S. 818, 86 L.Ed. 1215	6
Association of Data Processing Service Organization v. Camp (1970) 397 U.S. 150, 25 L.Ed.2d 184	6
Barlow v. Collins (1970) 397 U.S. 159, 25 L.Ed.2d 192	7
California Diversified Services Inc. v. Musick (C.A. 9) 505 F.2d 278 (1974)	9
City of Davis v. Coleman (C.A. 9) 521 F.2d 661 (1975)	6
City of Rohnert Park v. Patricia Roberts Harris, etc., et al. (C.A. 9) 601 F.2d 1040 (1979)	1
815 Mission Corp. v. Superior Court (1971) 22 C.A.3d 604	6
Fountain v. Filson (1949) 336 U.S. 681, 93 L.Ed. 971	9
Garrett v. City of Hamtramck (D.C. Mich.) 335 F. Supp. 16 (1971), 503 F.2d 1236, 399 F.Supp. 1151	4
Gibson & Perrin v. City of Cincinnati (C.A. 6) 480 F. 2d 936 (1973) cert.den. 414 U.S. 1068 (1973)	4, 5
Hunt v. Washington Apple Advertising Commission (1977) 432 U.S. 333, 53 L.Ed.2d 383	8, 11
Paschall v. Kansas City Star Co. (C.A. 8) 605 F.2d 403 (1979)	11
Singleton v. Wulff (1976) 428 U.S. 106, 49 L.Ed.2d 826	12
State of California v. Automobile Manufacturers Association (C.A. 9) 481 F.2d 122 (1973)	11

	Pages
United States v. Aluminum Co. of America (C.A. 2) 148 F.2d 416 (1945)	10
United States v. Williams (C.A. 5) 447 F.2d 1285 (1971)	3
Village of Arlington Heights v. Metropolitan Housing Development Corporation et al. (1977) 429 U.S. 252, 50 L.Ed2d 450	11
Warth v. Seldin (1975) 422 U.S. 490, 45 L.Ed.2d 343	9

Statutes

Administrative Procedure Act:	
5 U.S.C. 701 et seq.	6, 7, 8
5 U.S.C. 702	6
5 U.S.C. 706	6, 8
Clayton Act, 15 U.S.C. 12 et seq.	
Section 4 (5 U.S.C. 15)	10
Section 16 (5 U.S.C. 26)	5, 9, 10, 11
National Environmental Policy Act, 42 U.S.C. 4321 et seq.	10
National Housing Act, 42 U.S.C. 1441 et seq.	2
42 U.S.C. 1460(c)	2
42 U.S.C. 1460(c)(4)	6
Sherman Act, 15 U.S.C. 1, 2	11
28 U.S.C. 1254(1)	2

Rules of Court

Federal Rules of Civil Procedure:	
Rule 56(e)	3, 5

CODES	Pages
California Government Code	8
CONSTITUTIONS	
U.S. Constitution:	
Article III	8
REGULATIONS	
Department of Housing and Urban Development, Urban Renewal Handbook	2, 3, 4
Subparagraph (3)	4

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1051

CITY OF ROHNERT PARK, a municipal corporation,
Petitioner,

vs.

MOON LANDRIEU, as Secretary of the United States Department of Housing and Urban Development, CITY OF SANTA ROSA, a municipal corporation, URBAN RENEWAL AGENCY of the City of Santa Rosa, a public body, corporate and politic, and ERNEST W. HAHN, INC., a California corporation,
Respondents.

Petitioner's Reply to Brief for the Federal Respondent in Opposition

To the Honorable Warren E. Burger, Chief Justice of the Supreme Court of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

REPLY

On January 4, 1980, Petitioner City of Rohnert Park filed its Petition For Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to review its decision reported at 601 F.2d 1040. Jurisdiction of this

Court was and is invoked under the provisions of 28 U.S.C. 1254(1). On March 18, 1980, the Solicitor General of the United States, on behalf of Respondent United States Department of Housing and Urban Development (HUD), filed a "Brief For the Federal Respondent In Opposition" to the above-mentioned petition.

WHETHER THE HOUSING ACT CREATES A PRIVATE RIGHT OF ACTION IS IRRELEVANT

On page 9 of this Brief in Opposition, it is argued in support of the decision of the Court of Appeals that: "Petitioner does not contend that the Court of Appeals erred in concluding that the Housing Act does not create a private right of action to challenge fair value determinations under 42 U.S.C. 1460(c)" and that this "concession significantly limits petitioner's standing arguments * * *." This contention ignores that in the context of this case the question whether the Housing Act creates a private right of action is irrelevant. This is so for the reason that the record clearly shows that Respondent HUD, acting in concert with the "non-federal parties" violated the Housing Act and the regulations promulgated thereunder to reach an end forbidden under the antitrust laws. Hence, this is a case where the Respondents are attempting to reach an unlawful end through illegal means.

VIOLATION OF ITS OWN REGULATIONS BY HUD

Respondent HUD violated its own regulations in purporting to determine fair reuse value. (See App. pp. 347-367 for text of regulations, and particularly, pp. 365 to 367). In approving the land disposition price, Respondent HUD relied on materials which would not be admissible in support of its motion for summary judgment. For example, affidavits filed in support of HUD's motion for summary judgment disclose that its *concurrence* in the disposition price of $2,000,000 for the Phase II land ($100,000 per acre for 20 acres) was based on a recommendation made by Mr. Leeverne Johnson, a "Realty Specialist" employed by HUD.

Mr. Johnson's recommendation was in turn based on his review of two appraisals submitted to HUD, and a field review of the property. Mr. Johnson, by his own admission, has had *no* practical experience in real estate appraisal, and hence, could not qualify as an expert in this field. Accordingly, his recommendation cannot lend rational support to HUD's concurrence in the land disposition price. His recommendation is "hearsay in disguise," and therefore inadmissible. See *United States v. Williams* (C.A. 5) 447 F.2d 1285, 1290-1291 (1971).[1]

Moreover, no supporting affidavits based on personal knowledge of the authors of the appraisals (David Lane and Myers & Niethammer—Resp. App. p. 67) that Mr. Johnson reviewed were filed with the District Court. Therefore, there was actually no admissible evidence with respect to these appraisals before the District Court. Rule 56(e), Federal Rules of Civil Procedure.

The regulations of HUD (App. pp. 347-367) require *inter alia,* that appraisers be selected by Respondent Urban Renewal Agency, not Respondent HUD (App. p. 355). Furthermore, the appraisals "* * * shall be *reviewed* by a competent staff appraiser or private professional appraiser under contract to the (Respondent) Agency." (App. p. 365). By his own admission, Leeverne Johnson, an employee of HUD who reviewed the appraisals, could not qualify as a competent appraiser. He was merely a "Realty Specialist" (Resp. App. 66) with no practical experience as a profes-

1. Affidavit of Leeverne Johnson (Resp. App. p. 66).

sional appraiser, as he stated in his deposition. Nor, as shown by his deposition was he impressed by the fact that one of the two appraisals he reviewed, that of David Lane, declared the Hahn regional shopping center would, if built, enjoy a "monopoly position." Finally, Respondent Urban Renewal Agency did not adopt the resolution required by HUD's regulations (App. p. 366). Subparagraph (3) thereof requires a resolution which: "* * * Certifies that the work of the appraiser and the review appraiser has been performed in a competent manner in accordance with State law and HUD policies and requirements."

Accordingly, the argument of Respondent HUD that "* * * its participation simply fulfilled its statutory obligation to ensure that the resale price was correct * * *" (Fn. 10 on page 14 of its Brief In Opposition), is merely a disclaimer of its real responsibility. Such a disclaimer should not be tolerated. HUD must accept responsibility for the direction which an urban renewal program takes. To proceed, as it did here, by ignoring its own regulations and then claim innocence of what is being done with federal funds cannot be tolerated. *Garrett v. City of Hamtramck* (D.C. Mich.) 335 F.Supp. 16, 25 (1971), reversed for failure to make proper class certification and remanded. See 503 F.2d 1236 and 399 F.Supp. 1151 for order on remand. Thus, HUD may not wash its hands of the responsibility for complying with its own regulations by saying, as it did (id. p. 14) that it was not a party to any agreement with the non-federal Respondents to construct a regional shopping center. *Gibson & Perrin Co. v. City of Cincinnati* (C.A. 6) 480 F.2d 936 (1973), cert. den., 414 U.S. 1068 (1973), on which Respondent HUD relies, is inapposite. In that case, the federal defendants were voluntarily dismissed by plaintiffs who were then left with a claim of standing (1) as federal

taxpayers, (2) as persons having a personal stake in the outcome of the case and (3) as private attorneys general. The Court of Appeals, on the issue of standing, held only that "* * * persons located outside the Urban Renewal area * * *" do not have standing to "* * * question the design or location * * *" of buildings within that area (p. 941). Petitioner has not questioned the design or location of any buildings within the urban renewal area, nor has it challenged the redevelopment plan itself. The Court of Appeals did note, however, that plaintiff could have sought relief "* * * for violation of specific regulations adopted by the Secretary of HUD * * *," which is precisely what Petitioner has done here. On the antitrust issues, where plaintiff did not claim Section 16 (15 U.S.C. 26) standing, the *Gibson & Perrin* Court found no proof of competition.

One other specious claim by Respondent HUD deserves comment. On page 15 of its Brief In Opposition (Fn. 10), it attempts to leave this Court with the impression that the District Court acted properly on the basis of uncontradicted appraisal reports submitted to it, but not to HUD. In the first place, Petitioner filed the Affidavit of R. Dean Stahr in the District Court (App. p. 169) showing a fair reuse value substantially higher than that concurred in by HUD. Thus, Petitioner, by affidavit, has set forth specific facts showing there is a genuine issue for trial. Rule 56(e), Federal Rules of Civil Procedure. In the second place, Petitioner was not required to submit its appraisal to HUD or Respondent Urban Renewal Agency. Petitioner acted in compliance with Rule 56(e) by filing the Stahr affidavit in the District Court in opposition to Respondents' motions for summary judgment. The District Court cannot be said to have acted properly on the issue of fair reuse value. It did not even mention that issue for any purpose.

The notion that Petitioner should have submitted its appraisal evidence to Respondent Urban Renewal Agency is frivolous. Petitioner filed its complaint on November 19, 1974, *before* any of the validation proceedings (App. p. 234) were filed in state court by Codding Enterprises. Petitioner is not required to appear in a state court to challenge action of Respondent HUD. Indeed, HUD action could not be challenged there, since the Secretary could not be made a party to proceedings in the state court without his consent. *815 Mission Corp. v. Superior Court* (1971) 22 C.A.3d 604, 625. See also *Armond Schmoll Inc. v. Federal Reserve Bank* (1941) 37 N.E.2d 225, 227, 286 N.Y. 503, cert. den. 315 U.S. 818, 86 L.Ed. 1215.

PETITIONER HAS STANDING UNDER THE ADMINISTRATIVE PROCEDURE ACT

Since the District Court did not so much as mention the violation by HUD of 42 U.S.C. 1460(c)(4), Petitioner respectfully directs the attention of this Court to Sections 10 and 14 of the Administrative Procedure Act (5 U.S.C. 702, 706, both appearing at pp. 344 to 345 of Petitioner's Appendix and referred to hereinafter as APA). On the record in this case, Petitioner is entitled to relief from Agency action not in accordance with law and without observance of procedure required by law. It has shown injury in fact, economic or otherwise, from violation of a "relevant statute," to reach an end forbidden under the antitrust laws, and its interest is arguably within the zone of interests to be protected or regulated by the statute in question. *Association of Data Processing Service Organizations, Inc. v. Camp* (1970) 397 U.S. 150, 25 L.Ed.2d 184, *City of Davis v. Coleman* (C.A. 9) 521 F.2d 661 (1975).

From *City of Davis,* supra, one can reasonably conclude that standing is not affected if "municipal interests" are

economic, which they clearly are, e.g., the power to tax and spend for municipal purposes. Moreover, Petitioner's "municipal interests" will be severely circumscribed by construction of the Hahn regional shopping center in Santa Rosa. Here, Respondent HUD had established an economic nexus with Petitioner City of Rohnert Park. In its Final Environmental Impact Statement (FEIS), where HUD considered Rohnert Park as an alternative site, it stated that there was not a large enough market to support two major shopping center areas. Consequently, the center on the less desirable site would suffer and perhaps fail.[2]

In its complaint, Petitioner alleged economic loss (App. p. 8), and it is plain from the material allegations of the complaint that the illegal actions of Respondents are the proximate cause of that loss by Petitioner—namely, the loss of approximately $1,200,000 which it raised and disbursed acting in its proprietary capacity and on behalf of itself and its property owners, taxpayers and inhabitants.[3] Petitioner respectfully submits that its municipal interests are entitled to the same protection that this Court extended to the economic interests of tenant farmers in *Barlow v. Collins* (1970) 397 U.S. 159, 25 L.Ed.2d 192. There, this Court held that tenant farmers were entitled to judicial review of regulations of the Secretary of Agriculture, and that said review was available to them under the Administrative Procedure Act (5 U.S.C. 701, et seq.). They had standing to sue, since they had the personal stake and interest that impart the concrete adverseness required by

---

2. Page 125 of the FEIS, Exhibit 1 to Deposition of Michael Daugherty. Not included in Petitioner's Appendix.

3. These allegations were not "pierced" by any admissible evidence presented to the District Court by Respondents on motion for summary judgment.

Article III, U.S. Constitution, and fell within the zone of interests to be protected. Here, Petitioner can be said to have representational standing to sue under the Administrative Procedure Act to avoid not only irreparable economic loss but also a multiplicity of actions by the owners of property in Rohnert Park now zoned for commercial use—a regional shopping center. See *Hunt v. Washington Apple Advertising Commission* (1977) 432 U.S. 333, 53 L.Ed.2d 383. There, this Court noted on page 343:

> "Thus, we have recognized that an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted, nor the relief requests, requires the participation of individual members in the lawsuit."

Petitioner respectfully submits that, as a municipal corporation, it meets the above quoted criteria and that dismissal by the Court of Appeals for lack of standing sanctions a gross departure from the accepted and usual course of judicial proceedings. Rohnert Park was and is a political subdivision of the State of California and formed pursuant to the provisions of the California Government Code. The Washington State Apple Advertising Commission was a state agency created by the State legislature. The municipal interests of Petitioner are entitled to at least as much protection from economic loss as the apple growers of the State of Washington. Having shown injury in fact, economic or otherwise, Petitioner has standing under the APA to seek protection from such loss by injunctive relief (5 U.S.C. 706).

THE COURT OF APPEALS CANNOT DISMISS FOR LACK OF STANDING WITHIN THE CONTEXT OF THIS CASE

In 1975, this Court held that for purposes of ruling on a motion to dismiss for lack of standing, both the trial and reviewing courts must accept as true all the material allegations of the complaint. *Warth v. Seldin* (1975) 422 U.S. 490, 501, 45 L.Ed.2d 343, 356. Here, the District Court did not so much as discuss standing,[4] and the Court of Appeals simply ignored the material allegations of Petitioner's complaint. Instead of reversing and remanding to give Petitioner an opportunity to amend, if need be, to show standing, it dismissed *sua sponte,* thereby denying Petitioner due process of law. This it cannot do. *Fountain v. Filson* (1949) 336 U.S. 681, 93 L.Ed. 971, and *California Diversified Services, Inc. v. Musick* (C.A. 9) 505 F.2d 278 (1974). Neither the Court of Appeals nor any one of the Respondents herein has claimed that Petitioner could not amend its complaint to state a claim for relief and standing to assert it.

PETITIONER HAS STANDING TO SEEK INJUNCTIVE RELIEF UNDER SECTION 16, CLAYTON ACT

Finally, Respondent HUD deals with the antitrust issues as though Petitioner had alleged a monopoly. However, this is not what Petitioner did. It alleged an attempt or conspiracy to monopolize and presented evidence of specific intent—actual knowledge by HUD that a 700,000 square foot regional shopping center would "* * * absorb most of the needed growth of commercial space in Santa Rosa until about 1990." (App. pp. 371-372). In actuality, the Hahn regional shopping center will be 835,000 square feet (App. p. 376), the 19.3% increase over 700,000 square feet being

---

4. The District Court did *not* dismiss "the entire complaint" or any part of it as Respondent HUD claims on page 17 of its Brief in Opposition. It granted motions for summary judgment, and Petitioner appealed (App. p. 190).

excess capacity intentionally planned to exclude any privately financed shopping center in Rohnert Park. As Dr. Richard U. Ratcliff, in a reuse appraisal for the Santa Rosa Respondents, said in 1972 (App. p. 369): "* * * While the proposed Rohnert Park center is premature * * *, the actuality of the (Hahn) subject center (in Santa Rosa) *would kill off any possibility of a major development in Rohnert for a long time to come.*" (Emphasis added.)

In any event, Petitioner is not required to wait until the Hahn regional shopping center is built and then claim it has monopolized the relevant market for new retail space in the Santa Rosa Trade Area, as Respondent HUD suggests. Since excess capacity was planned as one of the preliminary steps to monopoly, the primary evil, it is dangerous and the law should "nip them in the bud." *United States v. Aluminum Company of America* (C.A. 2) 148 F.2d 416, 431 (1945).

Assuming *arguendo* that standing to sue for injunctive relief under Section 16, Clayton Act (15 U.S.C. 26) is jurisdictional, Petitioner submits that it had *no* opportunity to amend its complaint. The "notice" to which Respondent HUD adverted (p. 16, Federal Respondent's Brief In Opposition) dealt only with standing under the National Environmental Policy Act, standing to challenge an urban renewal plan, which Petitioner did not do; and standing under Section 4, Clayton Act (15 U.S.C. 15), the treble damage provision, which is not involved here. (App. pp. 105, 107-112, 151-154, 159-160). The only discussion of Section 16 dealt with standing of Petitioner as *parens patriae* (Resp. App. pp. 170-172), a status it has never claimed.

Petitioner respectfully submits that it has shown the *threatened* "loss or damage" required under Section 16, Clayton Act (15 U.S.C. 26) and that it has the right to be

free of anticompetitive practices illegal under the Sherman Act (15 U.S.C. 1, 2). Vindicating the public interest in enforcement of the antitrust laws must be considered on the same footing as the right of persons to be free of arbitrary and irrational zoning actions. *Village of Arlington Heights v. Metropolitan Housing Development Corporation et al.* (1977) 429 U.S. 252, 50 L.Ed. 450. Petitioner submits that the representational standing in *Hunt,* supra, should be considered together with its standing under Section 16 to vindicate such of its own interests as are "congruent with the interests of" its "inhabitants." *State of California v. Automobile Mfgrs. Assn.* (C.A. 9) 481 F.2d 122 (1973).

In conclusion, Petitioner submits that it has alleged facts and presented evidence sufficient to show threatened loss or damage by a violation of the antitrust laws and that such threatened fact of injury is causally related to Respondents' pending antitrust violations. *Paschall v. Kansas City Star Co.* (C.A. 8) 605 F.2d 403, 408 (1979).

CONCLUSION

The Petition For Writ of Certiorari should be granted for all the reasons set forth therein,[5] and in Petitioner's Reply to the Brief In Opposition of the two Santa Rosa Respondents and in this Reply to the Federal Respondent's Brief In Opposition.

April 2, 1980

Respectfully submitted,

WILLIAM M. BRINTON
RICARDO J. HECHT

By WILLIAM M. BRINTON
Attorneys for Petitioner

---

5. This Court has the inherent power to supervise the administration of justice in the lower courts, particularly where, as here, the Court of Appeals remanded for dismissal *sua sponte*. By deciding that Petitioner lacked standing to sue and doing so without notice or an opportunity to be heard, the Court of Appeals denied to Petitioner due process of law. This, it cannot do. *Singleton v. Wulff* (1976) 428 U.S. 106, 49 L.Ed.2d 826.

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of April, 1980, in accordance with Rule 33, Rules of the Supreme Court of the United States, three copies of the Petitioner's Reply to Brief For The Federal Respondent In Opposition were mailed postage prepaid to the counsel of record of Respondents as stated below:

Solicitor General
Department of Justice
Washington, D.C. 20530

John J. Powers III, Esq.
Appellate Section
Antitrust Division
Department of Justice
Washington, D.C. 20530

G. Williams Hunter, Esq.
Paul E. Locke, Esq.
450 Golden Gate Avenue
Post Office Box 36055
San Francisco, Calif. 94102

Joseph E. Coomes, Jr., Esq.
Richard E. Brandt, Esq.
McDonough, Holland & Allen
A Professional Corporation
555 Capitol Mall, Suit 950
Sacramento, California 95814

William N. Willens, Esq.
Stearns, Kim & Willens
A Professional Corporation
1150 Union Bank Tower
Torrance, California 90503

I further certify that all parties required to be served have been served.

WILLIAM M. BRINTON
1400 Alcoa Building
One Maritime Plaza
San Francisco, California 94111
Attorney for Petitioner